No. 83-1232

IN THE

Supreme Court of the United States

October Term, 1983

HOWARD WILLIAM MURRAY,
Petitioner,

v.

NEW MEXICO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under *United States v. MacDonald*, 456 U.S. 1 (1982), the time between dismissal of an indictment and the subsequent re-indictment on charges similar to those in the earlier indictment may be considered in determining an alleged violation of rights under the Speedy Trial Clause where the dismissal was initiated by a defendant's motion to dismiss, the State took no appeal from the dismissal, and the defendant was not under actual restraints or subject to criminal prosecution during the period.

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The Respondent, New Mexico, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the court of appeals of New Mexico in this case. The opinion is contained in the appendix of the petition.

STATEMENT OF THE CASE

A statement of the case is set out in the petition. Respondent, however, is not satisfied with its presentation and in particular with its mischaracterization of Respondent's actions, i.e., "confusing legal maneuvers" (Petition at 10). Another statement of the case, setting out the facts material to this Court's consideration of Petitioner's speedy trial claim, is therefore necessary.

Three indictments were brought against Petitioner. The first one was returned in February, 1976 in cause no. 27039. Respondent filed a nolle prosequi to that indictment. (2/18/77, Tape 1A at 265; R. 27176 (Ct. App. 5064) at 44, 51).

A second indictment in cause no. 27176 was returned on March 24, 1976. Trial was originally set for May 3, 1976 and then re-set for August 30, 1976 and again for October, 1976. The rescheduling was required to allow Petitioner and Respondent to file motions and was conditioned upon the waiver by Respondent of his speedy trial rights. In a motion filed on September 14, 1976, Respondent waived any claim of violation of his federal constitutional right to a speedy trial. In the same motion, he, also, waived the time requirements of New Mexico's speedy trial rule. N.M.R.Crim. P. 37, N.M.S.A. 1978, for a period ending on October 31, 1977 to commence the trial. (R. 27176 at 1-4, 8-45, 47, 51, 70-82, 102-168, 192-208, 260-262); (Petition at App. 4).

Respondent, pursuant to Rule 37, applied to the New Mexico supreme court for four extensions of time for commencement of the trial of cause no. 27176. Petitioner did not object to these requests. Respondent supported its third request on the ground that the extension was necessary because of the number and subject matter of defense motions. Respondent's fourth request for extension was prompted by the trial court's ruling

that trial was precluded as a matter of law by Petitioner's insanity and its dismissal with prejudice of the indictment. Respondent appealed and the court of appeals of New Mexico reversed and remanded the cause for trial. The mandate of the court of appeals issued on November 7, 1977. The fourth Rule 37 extension was granted until March 21, 1978. (R. 27176 at 69, 83-99, 169, 189, 200-201, 209, 219, 245-253).

On remand, trial was set for February 28, 1978 and then re-set for March 13, 1978. On the latter date, Petitioner filed a motion to dismiss. The motion was granted because of the unauthorized presence of a secretary transcriber in the grand jury room. The dismissal was entered on March 14, 1978 and was without prejudice. Respondent, on March 17, 1978, filed a motion to amend the order of dismissal so that an appeal could be taken therefrom. Respondent also on that date applied for a fifth Rule 37 extension to protect itself if it decided to appeal. The extension was granted until September 15, 1978 by which to try the case. The trial court, however, never ruled on Respondent's motion and Respondent never appealed or initiated any further action on cause no. 27176. (R. 27176 at 252, 257-258, 267-268, 270-279, 288, 290); (Tr. Cr. 27176 at 35-109); (Petition at App. 4-5, 22-23).

Following the dismissal of cause no. 27176, Petitioner's attorney, in July, 1978, joined the district attorney's office which had filed the indictment against Petitioner. A special prosecutor was assigned, because of the conflict that arose in the office, to re-evaluate Respondent's case against Petitioner for presentation to a grand jury. (10/13/82, In chambers Tape 1A at 3-26); (Petition at App. 24 n.3).

In January, 1981, Respondent sought to re-indict Petitioner in cause no. 33830. A target letter was sent to Petitioner, advising of the re-indictment. On January 9, 1981,

Petitioner applied to the district court for a temporary restraining order to prevent the re-indictment. The district court denied the request, ruling that there was no bar to re-indictment. It specifically found that cause no. 27176 ended upon the March 14, 1978 dismissal from which no appeal was taken by Respondent and that Rule 37 did not bar the re-indictment. An indictment was returned on February 9, 1981 in cause no. 33830. The underlying charges were similar to those under cause no. 27176. (Tr. CV-81-00816 (Ct. App. 5064 at 2-17)); (R. 33830 at 1-3).

On January 22, 1981, Petitioner filed a motion to dismiss with prejudice cause no. 27176. His motion alleged a failure to abide by the Rule 37 extension, which allowed trial to commence by September 15, 1978. The district court granted the motion. Respondent appealed to the court of appeals. That court reversed the dismissal, holding that the cause ended on September 15, 1978. Respondent petitioned for writ of certiorari to the supreme court. The supreme court granted the petition. It agreed with the result reached by the court of appeals but not its reasoning. The supreme court concluded that cause no. 27176 had ceased to be upon the March 14, 1978 dismissal of the indictment from which no appeal was taken. It held, therefore, that the Rule 37 extension to September 15, 1978 had no effect and that the district court had no jurisdiction to enter its latest dismissal of cause no. 27176. (R. 27176 at 294, 296, 299-310, 310-312); (Petition at App. 4-5).

In cause no. 33830, Petitioner filed on March 16 and 30, 1981 a motion to dismiss and a memorandum in support, alleging violations of his right to a speedy trial and of Rule 37 by a failure to bring him to trial by September 15, 1978, and circumvention of Rule 37(d). Petitioner additionally filed eleven other motions on March 16 and 30, 1981. He agreed

with Respondent to a vacation of the April 27, 1981 trial date. The district court entered an order on May 7, 1981 in which it ruled against Petitioner on his claims of violations of speedy trial and Rule 37 rights. It granted Petitioner's motion on his claim of circumvention of Rule 37(d). (R. 33830 at 20, 22, 46-47, 61, 66-68); (4/28/81, Tape 1A at 555).

Respondent appealed to the court of appeals. Petitioner took no appeal from the district court's adverse rulings on his claims of violations of speedy trial and Rule 37 rights. The court of appeals dismissed Respondent's appeal on a jurisdictional ground, i.e., failure to timely file the notice of appeal. Respondent filed a petition for writ of certiorari to the supreme court. The petition was denied. Respondent next, pursuant to N.M.R. Crim. App. 202(c), N.M.S.A. 1978, filed in district court a motion for extension of time by which to file a notice of appeal. Upon good cause shown, the district court, under Rule 202(c), may extend the time by 30 days from the time prescribed for the filing of the notice. Respondent's motion was granted and Respondent filed a notice of appeal in the court of appeals on September 15, 1981. The court of appeals dismissed the appeal, holding that the district court did not have jurisdiction to grant the motion. (R. 33830 at 75-93, 94-111, 115-121).

On writ of certiorari to the supreme court, the court of appeals ruling was reversed. The supreme court stated that procedural time limits are stayed until after a decision is rendered by the appellate court. It held, therefore, that the district court did have jurisdiction to grant Respondent's motion after the appeal was dismissed for lack of jurisdiction. The supreme court stated that it so interpreted Rule 202(c), as it does all procedural rules, liberally "to the end that causes on appeal may be determined on the merits where it can be done without impeding or confusing administration or perpetrating injustice." (Petition App. at 26). The supreme court also held that the district court's dismissal of cause no. 33830 was erroneous

because there was no circumvention of Rule 37, in light of the fact that the indictment under cause no. 27176 was dismissed pursuant to a defense motion. Neither party raised nor briefed the issue of the propriety of the district court's dismissal. The record before the supreme court, however, laid out the district court's ruling and the basis for the ruling. The supreme court, apparently, decided the issue under its inherent authority to correct rulings of the lower court which are erroneous as a matter of law. The supreme court remanded the case for trial and issued its mandate on June 21, 1982. (R. 33830 at 115-121).

Trial commenced in cause no. 33830 on October 13, 1982 and ended on October 22, 1982. Petitioner was found guilty of two counts of second degree murder and three counts of aggravated assault on a peace officer. (R. 33830 at 206).

Petitioner appealed his convictions to the court of appeals. He claimed a violation of his speedy trial right by a six and one-half-year delay between February, 1976, date of first indictment, and October, 1982, date of trial on the third indictment. His only allegation of prejudice was prejudice to his defense. Petitioner was at liberty during the entire six and one-half year period. In addition to appealing on a speedy trial violation ground, Petitioner appealed on the ground that he was denied due process by the five-year delay between his first indictment and his third indictment. The alleged prejudice suffered was prejudice to his defense. The court of appeals affirmed Petitioner's convictions, ruling against him on all his claims of error. The supreme court denied Respondent's petition for writ of certiorari. (Petition at App. 2-12).

(a) Federal Question Raised.

On March 16, 1981, Petitioner filed in district court a motion to dismiss the indictment in cause no. 33830, alleging inter alia a violation of his right to a speedy trial.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner imprudently requests this Court to exercise its review on writ of certiorari which review is a matter of judicial discretion and not of right. The questions raised by the petition in this case are of minor importance in the overall development of the law on the Speedy Trial Clause of the Sixth Amendment. The few decisions rendered since *United States v. MacDonald*, 456 U.S. 1 (1982), which deal with factual situations similar to that involved in this case do not conflict with the decision reached in this case by the court of appeals of New Mexico or with the principles set out in *MacDonald*. An examination of the record shows that the result reached in this case is fair.

1. Questions Presented Are of Minor Importance.

The questions posed by Petitioner have minor importance in the overall development of the law on the Speedy Trial Clause. The Clause is applicable to the states through the Fourteenth Amendment, United States Constitution. *Klopfer v. California*, 386 U.S. 213 (1967). In *MacDonald* the Court determined that the period between the dismissal of an indictment by the government, acting in good faith, and the subsequent re-indictment does not implicate the Speedy Trial Clause. Petitioner incredibly asks this Court to conclude that *MacDonald* is inapposite to his factual situation because the dismissal of the second indictment was occasioned by a defense motion to dismiss. No appeal was taken by Respondent from the dismissal. No further action was pursued by Respondent against Petitioner under the dismissed indictment. Petitioner

was at liberty, free from the anxiety of public accusation and of criminal prosecution.

Petitioner seeks to have this Court reach conflicting conclusions on the basis of superficial distinctions, significant only for their form and not for their substance. Nothing said in *MacDonald* draws any distinction between dismissals occasioned by the filing of a nolle prosequi by the government and those occasioned by a filing of a motion to dismiss by a defendant. *MacDonald* indicates that dismissals brought about by the government, acting in good faith, are like, if not extentions of, dismissals brought about by defense motions to dismiss. Specifically, the Court in discussing the position of the federal courts of appeals on the issue before the Court stated that most of them "considering this issue have also reached the conclusion that the period after the dismissal of initial charges is not included in determining whether the Speedy Trial Clause has been violated." *MacDonald, supra,* at 456 U.S. 7 n. 7.

A review of those cases cited by the Court for that proposition reveals that at least one of them involved a dismissal of an indictment pursuant to a defense motion to dismiss. *United States v. Bishton,* 150 U.S. App. DC 51, 463 F.2d 887 (1972). In another case, the initiator of the dismissal of the indictment is not identified. *United States v. Martin,* 543 F.2d 577 (CA 6 1976), *cert. denied,* 429 U.S. 1050 (1977).[1] In both cases, the courts held that the Speedy Trial Clause was inapplicable during the period between dismissal of the indictment and the re-indictment.

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1. Respondent submits that it is more likely than not that the initiator of the dismissal in *Martin* was the defense. A dismissal occasioned by the government would have led the court to discuss the propriety of the dismissal. Compare *Martin, supra,* with *MacDonald, supra,* and *United v. Alvalos,* 541 F.2d 1100 (1976), *cert. denied,* 430 U.S. 970 (1977).

Martin and *Bishton* each relied upon the rationale of *United States v. Marion*, 404 U.S. 307 (1971) "that the right to a Speedy Trial attaches when a prosecution has begun, either by indictment or by the 'actual restraints imposed by arrest.' " *Bishton, supra*, at 887. See *Martin, supra*, at 579. The *MacDonald* court also relied upon the *Marion* rationale in reaching its holding. *MacDonald, supra*, at 456 U.S. 6. The *Bishton* court explicitly determined that a person cannot lay claim to the speedy trial right for a "period between the end of one prosecution and the beginning of another, even when the two arise from the same occurrence" when he stands neither arrested nor indicted for an offense nor suffers actual restraints on his liberty or public accusation. *Bishton, supra*, at 891. That person's situation is unlike that of one who has been arrested and is held to answer to a charge. *Id.* Bad faith on the part of the government in delaying re-indictment may be a factor to be considered in determining whether the Speedy Trial Clause is applicable during the period between the dismissal of an indictment occasioned by a defense motion and the re-indictment. See *Bishton, supra*. In the absence of any such bad faith, *Bishton, Martin* and *MacDonald's* reliance on them instruct that there is no distinction under the Speedy Trial Clause between dismissals occasioned by the defense and those occasioned by the government.

Nothing is to be gained by further scrutiny of the Clause to satisfy Petitioner's argument which attempts to create a distinction on superficial grounds. Where a person is at liberty, free from the anxiety of public accusation and criminal prosecution, and cannot be again subjected to such anxiety or to actual restraints except upon re-indictment, it should not matter under the Speedy Trial Clause whether his liberty results from a defense motion to dismiss or from a nolle prosequi filed by the government. Respondent submits that the Clause instructs that it does not matter.

2. Limited Applicable Case Law and No Conflict.

An exercise of judicial discretion should be guided by a sufficient number of varied views, dealing with the issue for which the exercise is sought. Such is not the case here. If this Court were to grant the petition, it would find a paucity of decisions rendered since *MacDonald* dealing with factual situations similar to that before the bar. This Court would also find that these decisions do not conflict with that rendered by the court of appeals of New Mexico or with *MacDonald*.

Respondent has only found three opinions involving a dismissal occasioned by a defense motion and the question of the implication of the Speedy Trial Clause on the period between the dismissal and the subsequent re-charging. *United States v. Samples*, 713 F.2d 298 (7th Cir. 1983); *United States v. Loud Hawk*, 564 F. Supp. 691 (D.C. Oreg. 1983); *State v. Bailey*, 655 P.2d 494 (Mont. 1982). None are supportive of Petitioner's arguments.

In *Samples*, following dismissal of two counts of an indictment for improper venue and pursuant to a defense motion to dismiss, the government, like the State here, took no appeal. Twenty months later the defendant was re-indicted on the two dismissed counts in the court of proper venue. Relying upon *MacDonald*, the *Samples* court held that the Speedy Trial Clause was inapplicable during the twenty-month period. The court stated that "(i)t is scarcely realistic to suppose that a citizen, free from criminal charges, wants or deserves a speedy trial. Once all counts of the indictment were dismissed, the defendant 'was legally and constitutionally in the same posture as though no charges had been made' " *Samples, supra*, at 298. The defendant was not an accused.

In *Loud Hawk* and *Bailey*, the courts distinguished *MacDonald*, finding that each defendant before the court was

technically an accused following the dismissal of the cause pursuant to a defense motion to dismiss. The *Bailey* court determined that the accused status did not end because of the government's continued efforts, after the dismissal, to charge the defendant under the dismissed information. In essence, the court found that there was but one cause of action continuously pursued by the government. The government's efforts were concerned with the filing of motions seeking permission to file the information.

The court in *Loud Hawk* was faced with the question "whether a person is 'accused' during the time a court's dismissal of the indictment, on defendant's motion, is on appeal." *Loud Hawk, supra,* at 696. It answered in the affirmative. But one prosecution exists when the government appeals a dismissal. On appeal, there exists the possibility of reversal of the dismissal. "A person (thus) remains under prosecution unless and until the court on appeal affirms the dismissal." *Id.* While he awaits the outcome of the appeal, he suffers the anxiety of knowing the possibility of reversal.

Samples, Loud Hawk and *Bailey* stand for the proposition that a prosecution ends and a person is not an accused following a dismissal of an indictment or information occasioned by a defense motion to dismiss, if the government takes no appeal and otherwise ceases its efforts to prosecute the person under the dismissed indictment or information. This proposition is in accord with *MacDonald.* In substance, the government's decision not to appeal and to cease all efforts to prosecute under the dismissed cause is a declaration of its voluntary dismissal as much as the filing of a nolle prosequi is such a declaration. Said another way, it matters not for speedy trial purposes who initiates the dismissal, i.e., the defense or the government, but rather whether the government's actions following the dismissal demonstrate that the cause ended upon the dismissal.

In essence, the court of appeals of New Mexico determined, in reliance upon *MacDonald*, that the government's actions are indicative of whether a prosecution ends following a dismissal prompted by a defense motion to dismiss. Its determination and denial of Petitioner's speedy trial claim are in accord with *Sample*, *Loud Hawk* and *Bailey*, for it is clear from the record that the government took no appeal from the dismissal and ceased all efforts to prosecute Petitioner under the dismissed indictment. It is equally clear that Petitioner was at liberty and free from criminal prosecution during the period between dismissal and re-indictment. Respondent thus submits that, in light of the agreement among this case, *MacDonald* and the limited case law since *MacDonald*, that this Court's exercise of judicial discretion would be wanting in guidance to rule in Petitioner's favor.

3. A Fair Result.

This Court may feel prompted by allusions to questionable conduct on the part of Respondent and the appellate courts of New Mexico (Petition at 8-11, 14) to issue the writ in a belief that the result reached in this case was correct but not fair. Petitioner has alleged that he remained under the specter of criminal charges after the dismissal of the indictment in cause no. 27176. (Petition at 14). He has further alleged that Respondent employed "confusing legal maneuvers" to obtain review in the supreme court of a dismissal of an appeal in cause no. 33830 by the court of appeals. (Petition at 10). Allegations of improper review of the dismissal of the indictment in cause no. 33830 and of cursory review of his speedy trial claim by the court of appeals have also been made. (Petition at 8, 10-11). In sum, Petitioner has cast a negative light over the entire proceedings against him, in addition to alleging a violation of his right to a speedy trial. The record, however, is not supportive of Petitioner's contentions and explicitly

demonstrates the fairness of the treatment accorded to Petitioner.

Petitioner was not an accused following the dismissal of the indictment in cause no. 27176. No appeal or other actions under the dismissed indictment were pursued by Respondent. Petitioner was not subjected to public accusation or criminal prosecution. His allegations of being haunted by criminal charges cannot change the fact of his non-accused status in light of these facts.

If Petitioner were haunted by criminal charges, and the record does not demonstrate that he was, then it nevertheless can be said that he was in a better position than one who was "painfully aware" of an on-going investigation, who made repeated inquiries regarding the process of the investigation, and who retained counsel during the interim between the dismissal and re-indictment. *MacDonald, supra,* at 456 U.S. 18-19. Yet that person was not an accused and this Court found no need to say that the government "caused", unfairly or otherwise, a specter of criminal charges, warranting the application of the Speedy Trial Clause. That need does not arise in this case where the allegation of specter of criminal charges is suspect and the showing of complicity by Respondent in causing the specter is absent.

Petitioner's allegation of the employment of confusing legal maneuvers by Respondent is curious. What has been classified as confusing boils down to Respondent's taking of an appeal of the dismissal of the indictment in cause no. 33830, applying for certiorari to the supreme court after the appeal was dismissed for failure to timely file it, applying to the district court for a motion to extend the time for filing the notice of appeal after the supreme court denied the application, filing a new appeal after grant of its motion, and applying for and receiving permission to proceed on writ of certiorari to the supreme

court to review the court of appeals dismissal on a jurisdictional ground of Respondent's appeal. Contrary to Petitioner's contentions, these acts by Respondent are indicative of an orderly pursuit to have an appeal heard. Respondent has a constitutional and statutory right to appeal a dismissal of its indictment. Art. VI, Sec. 2, N.M. Const.; Section 39-3-3B, N.M.S.A. 1978.

The supreme court in considering the jurisdictional ground raised by Respondent's petition also considered the merits of the dismissal of the indictment by the district court. Petitioner's allegation of impropriety goes to this latter review. Respondent submits that where the issue is clear and the error of the lower court's ruling is plain on the face of the record, a defendant is denied no rights by a review by the appellate courts without benefit of briefs. See *Boykin v. Alabama*, 395 U.S. 238 (1969); *Silber v. United States*, 370 U.S. 717 (1962).

Petitioner, lastly, has alleged that the court of appeals conducted a cursory review of his claim of violation of speedy trial rights. Respondent answers that the review conducted by that court was brief but not cursory. That the court's review was not cursory is evidenced by its careful discussion of the facts and case law pertinent to the consideration of Petitioner's claim. (Petition at App. 3-6, 10-12).

As a particular look at Petitioner's allusions to questionable conduct by Respondent and the appellate courts demonstrate the absence of overreaching and the fairness of the result reached, likewise does a general look at the proceedings under the indictments and the period between indictments. Delays in the prosecution under indictment in cause no. 27176 were occasioned by the filing of many motions and resultant appeals and not by the advancement of tactical strategies by Respondent. Most of the motions were filed by Petitioner. Petitioner filed a waiver of his right to a speedy trial because of his desire to have the motions heard. Following the dismissal of the

indictment, Respondent left Petitioner alone, free from criminal prosecution. The re-indictment was the declaration of a new prosecution, resolution of prosecutorial conflicts, and the appointment of a special prosecutor. Prosecution under the new indictment was again delayed by the filing of motions by Petitioner. Those motions led to appeals. Upon resolution of the motions and the appeals, trial commenced with Petitioner's putting on sufficient evidence to support his defense. (Petition at App. 9). His evidence conflicted with that of Respondent. *Id.* The convictions were obtained upon the settling of the conflict in Respondent's favor based on the strength of Respondent's case and not through overreaching by Respondent. In sum, Respondent obtained the convictions against Petitioner through fair play. The result reached by the court of appeals is thus a fair one.

CONCLUSION

Respondent, New Mexico, respectfully requests this Court to deny the writ of certiorari. The exercise of the Court's discretion in favor of the questions raised by the petition will add nothing of significance to the law on the Speedy Trial Clause. The result reached by the court of appeals of New

Mexico is in accord with *MacDonald* and the limited applicable case law. The result is also a fair one.

Respectfully submitted,

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APPENDIX A

N.M.R.D.Ct. 37, N.M.S.A. 1978.[1]

Rule 37. Time limits; time of commencement of trial.

(a) Arraignment. The defendant shall be arraigned on the information or indictment within fifteen days after the date of filing of the information or indictment or the date of arrest, whichever is later.

(b) Trial. The trial shall be commenced within six months after the date of filing in the district court of the complaint, information, indictment or notice of appeal from the magistrate court or the date of arrest, whichever is later. In the event of a new trial, mistrial or reversal of a conviction on appeal, a subsequent trial shall be commenced within six months after the date of the order granting the new trial, the declaration of the mistrial or the mandate of the appellate court.

(c) Extension of time. The time for commencement of trial as specified in the preceding paragraph may be extended only by the supreme court of New Mexico, a justice thereof, or a judge designated by the supreme court, for good cause shown. The party seeking an extension of time beyond the six-month period shall, within said six-month period, file with the clerk of the supreme court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause and forthwith serve a copy thereof on opposing counsel. Hearings on such petitions will be held in Santa Fe, or such other place as may be designated by the supreme court, on five days' notice to the parties.

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1. The Rule 37 cited in the petition (Petition at 3-4) was not the rule applicable during the period when Respondent applied for extensions for commencement of trial.

(d) Effect of noncompliance with time limits. In (the) event the trial of any person described in Paragraph (b) of this rule does not commence within the time therein specified, or within the period of any extension granted as provided in this rule, the information or indictment filed against such person shall be dismissed with prejudice, unless the supreme court finds that the defendant is responsible for failure to comply with the time limits. If the supreme court finds that the defendant is responsible for the failure to comply with the time limits, the defendant not in custody may have his release revoked unless there is good cause shown for the failure to comply.

(e) Definition of "in custody." As used in this rule, "in custody" means custody on the charge contained in the information or indictment. [As amended, effective April 1, 1976.]